

2004

Lawrence W. Searle and Ann C. Searle v. Milburn  
Irrigation Company; William M. Hamilton; and  
The Utah State Engineer, Jerry D. Olds, P.E. :  
Appellant's Reply Brief

Utah Supreme Court

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John H. Mabey, Jr.; David C. Wright; Mabey and Wright, LLC; Attorneys for Milburn Irrigation Co.; Heather B. Shilton; Utah Attorney General's Office; Attorney for Jerry D. Olds, Utah State Engineer. Bryan J. Pattison; Durham Jones and Pinegar; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

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LAWRENCE W. SEARLE and ANN C.  
SEARLE,

Plaintiffs/Appellants,

v.

MILBURN IRRIGATION COMPANY;  
WILLIAM M. HAMILTON; and THE  
UTAH STATE ENGINEER, JERRY D.  
OLDS, P.E.,

Defendants/Appellees.

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Case No. 20040406-SC

On appeal from a judgment of the Sixth District Court for Sanpete County  
The Honorable David L. Mower

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APPELLANTS' REPLY BRIEF

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John H. Mabey, Jr.  
David C. Wright  
MABEY & WRIGHT, LLC  
265 East 100 South #300  
Salt Lake City, UT 84110  
Attorneys for Milburn Irrigation Co.

Heather B. Shilton  
UTAH ATTORNEY GENERAL'S OFFICE  
1594 West North Temple #300  
Salt Lake City, UT 84116  
Attorney for Jerry D. Olds, Utah State  
Engineer

**UTAH SUPREME COURT  
BRIEF**

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Bryan J. Pattison (8766)  
DURHAM JONES & PINEGAR  
192 East 200 North, Third Floor  
St. George, Utah 84770  
(435) 674-0400  
Attorneys for Appellants

*Oral Argument Requested*

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## TABLE OF CONTENTS

I.	Once An Applicant Makes A Prima Facie Case Of Non-Impairment, The Burden Of Proving Impairment Shifts To The Protestant .....	1
II.	Appellees’ Proposed Standard Of Proof Conflicts With Established Precedent And Is At Odds With The Preliminary Nature Of Change Use Applications .....	3
A.	A Preponderance Of The Evidence Standard For Showing Impairment, By Definition, Leaves Doubt About Whether Impairment Might Actually Result If A Change Is Approved.....	3
B.	This Court Did Not Establish A Preponderance Of The Evidence Standard In <i>Crafts</i> .....	6
III.	The Direct Evidence Requirement For Showing Impairment Is Necessary And Workable .....	7
IV.	Neither Milburn Nor The State Engineer Have Properly Challenged The Trial Court’s Finding That The Searles Met Their Prima Facie Burden.....	10
	Conclusion .....	12

## TABLE OF AUTHORITIES

### **Cases:**

<u>American Fork Irrigation Co. v. Linke</u> , 121 Utah 90, 239 P.2d 188 (1951) .....	3, 9
<u>Bailey v. Bayles</u> , 2002 UT 58, 52 P.3d 1158 .....	1
<u>Butler, Crockett &amp; Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.</u> , 2004 UT 67, 98 P.3d 1.....	9
<u>Crafts v. Hansen</u> , 667 P.2d 1068 (Utah 1983).....	2, 6, 7
<u>DeBry v. Noble</u> , 889 P.2d 428 (Utah 1995).....	6

<u>Eardley v. Terry</u> , 94 Utah 367, 77 P.2d 362 (1938) .....	2
<u>Green River Canal Co. v. Thayn</u> , 2003 UT 50, 84 P.3d 1134 .....	8
<u>Harken Southwest Corp. v. State ex. Rel. Dep’t of Natural Resources</u> , 920 P.2d 1176 (Utah 1996).....	3
<u>Heine v. Reynolds</u> , 367 P.2d 708 (N.M. 1962) .....	8
<u>In re Boyer</u> , 248 P.2d 540 (Idaho 1952).....	7
<u>Kirchgestner v. Denver &amp; Rio Grande Western R. Co.</u> , 118 Utah 41, 233 P.2d 699 (1951).....	4
<u>Knight v. Chamberlain</u> , 6 Utah 2d 394, 315 P.2d 273 (1957) .....	6
<u>Little Cottonwood Water Co. v. Kimball</u> , 76 Utah 243, 289 P. 116 (1930) .....	4
<u>Low v. City of Monticello</u> , 2004 UT 90, 103 P.3d 130 .....	5
<u>Nova Cas. Co. v. Able Constr., Inc.</u> , 1999 UT 69, 983 P.2d 5751 .....	11
<u>Salt Lake City v. Boundary Springs Water Users Ass’n</u> , 2 Utah 2d 141, 270 P.2d 453 (1954) .....	9
<u>Salt Lake City v. Silver Fork Pipeline Corp.</u> , 2000 UT 3, 5 P.3d 1206 .....	8
<u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991) .....	5
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994).....	8
<u>State v. Shoulderblade</u> , 905 P.2d 289 (Utah 1995) .....	7
<u>State v. South</u> , 924 P.2d 354 (Utah 1996).....	11
<u>Tanner v. Humphreys</u> , 87 Utah 164, 48 P.2d 484 (1935) .....	2
<u>Washington County Water Conservancy District v. Morgan</u> , 2003 UT 58, 82 P.3d 1125.....	7
<u>United States v. District Court</u> , 121 Utah 1, 238 P.2d 1132 (1951) .....	8

**Abbreviations:**

“Aplt. Br.”: Brief of Appellants

“Eng’r Br.”: Brief of the Utah State Engineer

“Mil. Br.”: Brief of Appellee Milburn Irrigation Co.

“Op.” : Trial Court’s Findings of Fact and Conclusions of Law

## APPELLANTS' REPLY BRIEF

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### **I. ONCE AN APPLICANT MAKES A PRIMA FACIE CASE OF NON-IMPAIRMENT, THE BURDEN OF PROVING IMPAIRMENT SHIFTS TO THE PROTESTANT.**

The State Engineer initially argues that the burden never shifts from a change applicant to a protestant to prove impairment, even after the change applicant makes a prima facie showing of non-impairment. (Eng'r Br. at 22.) Thus, the State Engineer asserts the trial court erred in shifting the burden of proof to Milburn after the Searles made their prima facie case. (*See id.*)

The first problem with this argument is that it is not clear whether the trial court shifted the burden of production or proof to Milburn, because its decision does not expressly state as much. (Op. at 9-10, ¶¶6-8.) In fact, none of the parties specifically brought to the trial court's attention whether the burden that shifted to Milburn was one of proof or production. (*R. passim.*) While this Court can affirm the trial court on alternative grounds, even where such grounds are not raised below, it can only do so when the alternate legal ground or theory is "apparent on the record." Bailey v. Bayles, 2002 UT 58, ¶13 & n.3, 52 P.3d 1158. The unclear language in the trial court's decision and the lack of a record on the issue deprives this Court of the opportunity to accept the State Engineer's initial argument, and affirm on that basis alone. See id. at ¶13 n.3.

The second problem with this argument is that it is an incorrect statement of the law. The State Engineer bases his argument on general case law addressing motions to

dismiss, burdens of proof in general civil and criminal cases, and a claim that Crafts v. Hansen, 667 P.2d 1068 (Utah 1983) merely refers to “shifting [the] burden of production of evidence, not the ultimate burden of proof.” (Eng’r Br. at 19.)

In Crafts, this Court said just the opposite of what the State Engineer seeks to have this Court imply. There the court stated that once an applicant makes a prima facie showing that there is reason to believe his change can be lawfully approved the burden of “*proving*” impairment shifts to the protestant. Crafts, 667 P.2d at 1081 (emphasis added). Of course, this has always been the standard. See Eardley v. Terry, 94 Utah 367, 378, 77 P.2d 362, 366-67 (1938) (showing of general negative of non-impairment by applicant is sufficient “to put the protestant on *proof* that he would be injured” (emphasis added)); Tanner v. Humphreys, 87 Utah 164, 174-75, 48 P.2d 484, 488-89 (1935) (rejecting argument that burden of proving non-impairment remains, at all times, with the applicant).

In sum, after ruling that the Searles met their burden of showing non-impairment, the trial court correctly shifted the burden of proving impairment to Milburn. It is whether Milburn’s factual showing was sufficient to sustain a finding of impairment that is the central issue on appeal.

**II APPELLEES' PROPOSED STANDARD OF PROOF CONFLICTS WITH ESTABLISHED PRECEDENT AND IS AT ODDS WITH THE PRELIMINARY NATURE OF CHANGE USE APPLICATIONS.**

**A. A Preponderance Of The Evidence Standard For Showing Impairment, By Definition, Leaves Doubt About Whether Impairment Might Actually Result If A Change Is Approved.**

Milburn and the State Engineer focus their attention on the preponderance of the evidence standard. They assert that under a preponderance of the evidence standard, the trial court's finding of a likely hydrologic connection is sufficient to show impairment as a matter of law because the preponderance of the evidence standard only requires a showing of "more likely than not." (Mil. Br. at 14-18 (citing Harken Southwest Corp. v. State ex. Rel. Dep't of Natural Resources, 920 P.2d 1176, 1182 (Utah 1996) (defining preponderance of the evidence as "more likely than not."); Eng'r Br. at 23.)

However, this standard simply cannot be squared with long-standing precedent which requires more than a factual showing that approval of an application might, possibly, could, or has the potential to impair vested rights. See American Fork Irrigation Co. v. Linke, 121 Utah 90, 95, 239 P.2d 188, 191 (1951). See also Brief of Appellants at 22-24, 33-35 discussing cases in Utah and other western states which establish this principle.

Regardless of the spin Milburn and the State Engineer place on the term, a finding of a likely connection is no better than a showing of a possible or potential connection. The State Engineer indicated as much in his memorandum decision, stating "[g]iven the *likely possibility* of fractures in the geologic strata, the area proposed for diversion *could*

serve as a contributing source for the protestant's water supply.” (Mem. Dec. March 8, 2002) (Emphasis added.)<sup>1</sup> Indeed, in this context, “likely” is simply a euphemism for “possibly” or “could.” This is not enough under our case law.

Moreover, as set forth in our opening brief (at 23, 31), this Court has held that in a doubtful case, where the conclusion is not clear, the policy of this state is to approve the application. See Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 248, 289 P. 116, 118 (1930). Milburn asserts this is not a doubtful case, but advances a standard that by definition leaves some level of doubt and uncertainty. Thus, if this case turns on the evidentiary standard, as Milburn argues, the standard cannot be preponderance of the evidence.

The standard that removes the doubt and uncertainty is the standard we advanced below, a standard that requires the protestant to show clearly and definitively—clearly and convincingly—that its rights will be impaired. Proof is not clear and convincing “if the court entertains reasonable doubt.” Kirchgestner v. Denver & Rio Grande Western R. Co., 118 Utah 41, 44, 233 P.2d 699, 700 (1951). This is what we argued below. (R. 175 Tr. 256, 257:1-2.) To be clear and convincing, a matter

must at least have reached a point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained not a slight, but a reasonable doubt as to the correctness of its conclusion would seem to be in a state of confusion.

Kirchgestner, 118 Utah at 44, 233 P.2d at 700 (citation omitted). Moreover, clear and convincing proof “has the element of clinching such truth or correctness. Clear and

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<sup>1</sup> Attached at Addendum C to our opening brief.

convincing proof clinches what might be otherwise probable to the mind.” Id. (citation omitted).

This is the standard that removes the doubt from these cases and furthers the policy of ensuring that water is put to beneficial use, that an applicant will be allowed a period of experimentation to show, once and for all, that the change will not impair vested rights, and will ensure that the State Engineer (and trial court on de novo review) is not adjudicating water rights. The trial court’s finding that there is a likely connection between Milburn’s source of water and the Searles’ proposed source of supply because, as stated by the trial court, “the water has got to come from somewhere,” (R. 175 Tr. 266:21) does not meet the legal standard for showing impairment.

Thus, while this Court can defer to the trial court’s finding of a “likely” hydrologic connection,<sup>2</sup> it should reverse the ultimate conclusion that such a finding constitutes impairment as a matter of law. See Low v. City of Monticello, 2004 UT 90, ¶11, 103 P.3d 130 (appellate court defers to trial court’s factual findings but grants no deference to its conclusions that such findings constitute the legal issue in question).

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<sup>2</sup> Both Milburn (Mil. Br. at 21) and the State Engineer (Eng’r Br. at 4) somewhat indirectly refer to the marshaling requirement. However, we do not lodge a challenge to the trial court’s factual finding that there is a likely hydrologic connection, i.e., we do not assert this finding is clearly erroneous. Rather, we assert that the finding, as a matter of law, does not constitute impairment. Thus, this Court cannot affirm for the sole reason that we seek a legal determination on the effect of an unchallenged finding. See Saunders v. Sharp, 806 P.2d 198, (Utah 1991) (once appellate court affirms factual findings, it must then proceed to “review the trial court’s conclusions of law and its application of the law to the facts as found.”).

**B. This Court Did Not Establish A Preponderance Of The Evidence Standard In *Crafts*.**

Milburn grounds its argument for a preponderance standard by quoting dicta from *Crafts*, wherein a majority of the court referred to a protestant's burden as showing by a preponderance of the evidence that a change cannot lawfully be approved. *See Crafts*, 667 P.2d at 1081 (Durham, J., joined by Howe & Stewart, JJ.). However, in *Crafts*, the "sole issue" before the court was whether there existed a genuine issue of material fact precluding summary judgment. *Id.* at 1069. The majority's language concerning a preponderance of the evidence standard was therefore dicta and "of no particular concern as precedent." *Knight v. Chamberlain*, 6 Utah 2d 394, 396, 315 P.2d 273, 274 (1957) (questions not directly presented for review are dicta and do not create binding precedent); *see also DeBry v. Noble*, 889 P.2d 428, 435 (Utah 1995) (judicial statements made in the course of discussion of an issue not directly confronting the court do not constitute the holding of the court).<sup>3</sup>

Indeed, it would be illogical to believe that the majority would, at the outset of its opinion reiterate the standard it had been articulating since at least 1954, *see Crafts*, 667 P.2d at 1070, then at the conclusion of its opinion intentionally abandon this standard, particularly where the issue was not placed squarely before the court complete with briefing on the competing arguments and interests—as in the instant case. If Milburn is correct, then so was Justice Oaks in asserting that the majority was unwittingly reversing long-standing precedent. *See id.* at 1082-83 (Oaks, J., dissenting).

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<sup>3</sup> The State Engineer concedes this point in his brief. (Eng'r Br. at 19.)

However, we need not go that far. If the majority in Crafts intended to overrule long-standing precedent it could have easily said so in that case. It did not. To the contrary, it noted that it was not overruling precedent but merely holding that a genuine issue of fact existed for trial, thus precluding summary judgment. See id. at 1071 n.2. Therefore, until such time as this Court determines to overrule itself and accept a burden that requires such a low standard of proof that a protestant can simply stumble over it, under the principle of stare decisis it must follow its prior rulings. See State v. Shoulderblade, 905 P.2d 289, 292 (Utah 1995).

In sum, this Court has never held that the burden in change application cases is a preponderance of the evidence.

### **III. THE DIRECT EVIDENCE REQUIREMENT FOR SHOWING IMPAIRMENT IS NECESSARY AND WORKABLE.**

Milburn asserts that requiring direct evidence is unworkable in these cases. (Mil. Br. at 22-26.) However, because such evidence was not present does not mean it is impossible to come by. Indeed, the state's own experts testified that while this evidence may be difficult to come by, actual testing is the only way to be sure of a hydrologic connection. (R. 175 Tr. 177-79; 224:6-9.)

This is not unheard of. It is the type of evidence that was required in Washington County Water Conservancy District v. Morgan, 2003 UT 58, 82 P.3d 1125. It is the type of evidence the Idaho Supreme Court required in In re Boyer when it refused to find impairment. See 248 P.2d 540, 545-46 (Idaho 1952) (finding no impairment because there was no "determination of a definitive amount of water" that would be lost from

approval of a change). And it does not mean that testing is always necessary. For example, in Heine v. Reynolds, 367 P.2d 708 (N.M. 1962), impairment was shown because there was positive testimony that when water was pumped from a water source it increased the salt content of water in the source, which impaired prior vested rights. See id. at 711.

Milburn relies on Salt Lake City v. Silver Fork Pipeline Corp., 2000 UT 3, 5 P.3d 1206, and argues that the Utah Supreme Court does not require such evidence in water rights cases. However, Silver Fork is inapposite. It was a quiet title action. See id. at ¶18. Thus, the court was not faced with the same principles and limitations that are present in change application cases. In particular here, that the State Engineer, and by extension the trial court on de novo review, does not have the authority to adjudicate water rights. See Green River Canal Co v. Thayn, 2003 UT 50, ¶30, 84 P.3d 1134. However, accepting Milburn's arguments this Court will have done just that.

Milburn also asserts that we have advocated, essentially, a double standard insofar as Robinson may have relied on circumstantial evidence in rendering his opinion but we are advocating for direct evidence from Milburn. (Mil. Br. at 24.) Milburn is correct in this regard and the reason is obvious. Analyzing the respective burdens of applicant and protestant by using the Pena pasture metaphor, see State v. Pena, 869 P.2d 932, 937-38 (Utah 1994), when the Searles were attempting to show that their application could be approved without impairing Milburn's rights, the pasture was large and the trial court, as fact finder, was given considerable room to roam—discretion—in making its determination. See , e.g., United States v. District Court, 121 Utah 1, 11, 238 P.2d 1132,

1137 (1951); American Fork Irrigation Co. v. Linke, 121 Utah 90, 95, 239 P.2d 188, 191 (1951); Salt Lake City v. Boundary Springs Water Users Ass’n, 2 Utah 2d 141, 143-44, 270 P.2d 453, 455 (1954); see also Aplt. Br. at 21-24, 27-32.

However, when the burden shifts to the protestant, the pasture of discretion shrinks considerably. As we argued below, the only evidence that is legally sufficient to meet the burden established by this smaller pasture is evidence that shows, clearly and definitively, that the water at point A comes out at point B. It is undisputed this evidence was not presented in this case. (Op. at 8, ¶32 (finding “there is no direct evidence” of a hydrologic connection).) With such evidence the trial court could have definitively concluded that Milburn would be impaired if the Searles’ Change Application was approved.

Milburn, while not referring specifically to the standard of review and discretion afforded the trial court, suggests that such discretion must always be broad because we are dealing with scientific issues in which expert testimony must be weighed and considered. In Butler, Crockett & Walsh Development Corp. v. Pinecrest Pipeline Operating Co., 2004 UT 67, 98 P.3d 1, this Court recognized that “the importance of insuring that the waters of our state are put to beneficial use” mandates the narrowing of the discretion afforded trial courts. Id. at ¶¶49-50. Butler, Crockett & Walsh was before the court in the context of reviewing a trial court’s ruling on beneficial use. See id. at ¶50.

Ultimately the court determined the amount of discretion afforded trial courts should be significant, though not broad. See id. This was due, in part, to the fact “that

the concept of beneficial use is “not static.” Id. at ¶46. What may constitute beneficial use in one case may not constitute beneficial use in the next. See id. Not so with impairment. Either an applicant is seeking to draw water from a protestant’s source or he is not. It is the protestant’s burden to show the former. Milburn failed to do so in this case.

In sum, the direct evidence standard for showing impairment is a necessary and workable burden to place on protestants after an applicant has made his prima facie case.

#### **IV. NEITHER MILBURN NOR THE STATE ENGINEER HAVE PROPERLY CHALLENGED THE TRIAL COURT’S FINDING THAT THE SEARLES MET THEIR PRIMA FACIE BURDEN.**

Milburn and the State Engineer argue that a likely hydrologic connection is the greatest possible showing that could have been required of them, because everything else is, essentially, junk science. In this regard, they liberally pepper their briefs with excerpts of Robinson’s testimony, quotes from his publications, and comments from the trial court that, read in isolation, suggest that the theory advanced by Forbush and Williamson was on firmer scientific footing than Robinson’s.

However, if that was the case, the trial court was free to reject Robinson’s view and determine that the Searles did not meet their burden of showing non-impairment. However, the trial court did not do so. Rather, it accepted Robinson’s testimony and theory with respect to non-impairment by expressly finding “there is reason to believe the groundwater intercepted by and providing the source for the Jacobson Well is a source of water completely separate from and has no hydrologic connection with the source of

supply for Milburn.” (Op. at 7, ¶31.) On appeal, neither Milburn nor the State Engineer challenges this determination as clearly erroneous.

While it is not necessary for an appellee to file a cross-appeal in arguing to affirm on the grounds that the trial court committed an error in another aspect of the case which leads to the same result, our appellate courts have never held that this relieves an appellee from its obligation to show that error as it would any other issue on appeal. See Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶7, 983 P.2d 575; State v. South, 924 P.2d 354, 356-57 (Utah 1996).

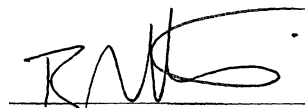
Thus, this Court must summarily reject Milburn and the State Engineer’s efforts to weave uncertainty into Robinson’s testimony, and by extension the Searles’ prima facie case, to gain advantage on appeal.

### **CONCLUSION**

For the foregoing reasons, and those stated in our opening brief, the trial court’s judgment must be reversed.

Respectfully submitted this 8<sup>th</sup> day of March 2005.

**DURHAM JONES & PINEGAR**



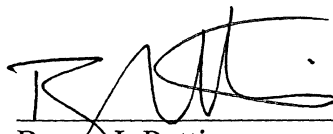
Bryan J. Pattison  
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on March 8<sup>th</sup>, 2005, I served two (2) copies of the **APPELLANTS' REPLY BRIEF** upon counsel for each of the Appellees in this matter, via first class mail with sufficient postage prepaid, to the following address:

John H. Mabey, Jr.  
David C. Wright  
MABEY & WRIGHT, LLC  
265 East 100 South #300  
Salt Lake City, UT 84110

Heather B. Shilton  
UTAH ATTORNEY GENERAL'S OFFICE  
1594 West North Temple #300  
Salt Lake City, UT 84116

  
\_\_\_\_\_  
Bryan J. Pattison